SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 162

UNITED STATES OF AMERICA,

Appellant,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION AND STATEMENT IN SUPPORT OF MOTION TO CLARIFY AND DEFINE THE ASSIGNMENT OF ERRORS AND STATEMENT AS TO JURISDICTION OR IN THE ALTERNATIVE TO DISMISS.

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INDEX

Subject Index

	Page
Motion and statement in support of motion to clarify and define the asignment of errors and statement as to jurisdiction or in the alternative to dismiss	1
Introduction	2
The nature of the proceedings below	5
The nature of the government's appeal	7
The burden placed upon appellee and the court by the excessive vagueness of the papers as filed	15
Conclusion	19

Table of Cases Cited

American Tobacco Company v. *United States*, 328 U.S. 781 — 10, 12, 13

Besser Manufacturing Company v. *United States*, 343 U.S. 444 — 5, 17

City Bus Company v. *Mississippi*, 299 U.S. 520, 300 U.S. 639 — 5

Gogate, Petition of, 126 F. 2d 1020 — 16

Local 167 v. *United States*, 291 U.S. 293 — 2

Schine Chain Theatres v. *United States*, 329 U.S. 686 — 4

Seaboard Airlines Railway Company v. *Watson*, 287 U.S. 86 — 2

Times-Picayune Publishing Company v. *United States*, 345 U.S. 594 — 9

Timken Roller Bearing Company v. *United States*, 341 U.S. 593 — 2, 4, 5, 17

Twisp Mining and Smelting Company v. *Chelan Mining Company*, 320 U.S. 705 — 5

United Shoe Machinery Corporation v. *United States*, 258 U. S. 451 — 14

United States v. *Aluminum Company*, 148 F. 2d 416 — 13, 14

United States v. *E. I. Du Pont De Nemours and Company*, 118 Fed. Supp. 41 — 2

Page

United States v. *Oregon State Medical Society*, 343 U.S. 326 ..... 5, 17

United States v. *United Shoe Machinery Corporation*, 110 F. Supp. 285 ..... 13, 14

United States v. *Yellow Cab Company*, 338 U.S. 338 ..... 5, 17

STATUTES AND OTHER AUTHORITIES CITED

Expediting Act of February 11th, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25th, 1948, 62 Stat. 869 2

Sherman Act:

Section 2 ..... 2, 10, 13

Section 4 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 1216

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY,
Defendant-Appellee.

MOTION AND STATEMENT IN SUPPORT OF MOTION TO CLARIFY AND DEFINE THE ASSIGNMENT OF ERRORS AND STATEMENT AS TO JURISDICTION OR IN THE ALTERNATIVE TO DISMISS.

Appellee respectfully moves the Supreme Court of the United States pursuant to paragraph 3 of Rule 12 of its Revised Rules, for an order directing appellant to clarify and define its Assignment of Error and Statement as to Jurisdiction or in the alternative for an order dismissing the appeal because of the excessive vagueness and generality of such papers. The ground for this Motion are that the appeal papers do not contain a proper statement of what questions actually presented are claimed to be substantial as required by Rule 12 and that an order is required to assure a proper statement of the particular findings of fact

or conclusions of law which appellant desires to have reviewed by the Court, to disclose to appellee the issues which it must meet on appeal and to limit the scope of this proceeding in a manner appropriate to the appellate jurisdiction of the Supreme Court of the United States.

Introduction

This is a direct appeal from the Final Judgment of the United States District Court for the District of Delaware dismissing with prejudice a civil proceeding under Section 4 of the Sherman Act charging appellee with monopolizing, attempting to monopolize and conspiring to monopolize interstate commerce in cellophane and cellulosic caps and bands in violation of Section 2 of the Sherman Act. The opinion and findings of the district court are reported at 118 F. Supp. 41.

Under the Expediting Act [1] the Government's only right to review the dismissal lies in the Supreme Court. This right to appeal is not an automatic right. It is a right to which even the Government is entitled only where it has delineated and specified the grounds of its appeal with sufficient particularity to pose clearly reviewable issues. The Court stated recently in *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596, n. 6, that an assignment of errors so drawn that their "excessive number obscures the actual grounds on which appellant relies for reversal" subjects an appeal of this type to dismissal. See also *Local 167* v. *United States*, 291 U. S. 293, 296. In *Seaboard Air-Line Railway Co.* v. *Watson*, 287 U. S. 86, 91, the Court dismissed an appeal because the assignment of error raising the federal question substituted "vague and general statement for the prescribed particularity."

[1] Expediting Act of Feb. 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

Appellant here has obscured the grounds on which it relies for reversal by making a sweeping attack on virtually every thing done by the district court. The defect of its Assignment of Errors lies in the generality of the errors assigned and in the excessive vagueness and lack of particularity in the way they are stated. All findings and conclusions of the lower court relating to cellophane are left open to challenge on review. This defect is compounded by erroneous statements of the holdings of the district court in the Statement as to Jurisdiction. Appellee believes that these defects warrant a dismissal of the appeal, or at the very least an order directing appellant to specify with particularity the findings and rulings it desires reviewed.

The procedural and trial difficulties caused by cases of this type have been the subject of increasing concern on the part of the bench and the bar for a number of years. In 1951 the Judicial Conference of the United States adopted the report of a committee headed by Judge E. Barrett Prettyman on Procedure in Antitrust and Other Protracted Cases designed to give guidance on methods of eliminating unnecessary issues and in expediting the trial of these cases. The Attorney General's National Committee to Study the Antitrust Laws is now giving further consideration to this problem. In addition, it has been the subject of numerous legal writings and discussion by sections of the American Bar Association and various of the local bar associations.

The effectiveness of these efforts to lessen the practical problems of litigation of antitrust cases will be assisted or retarded by the action of the Supreme Court on this appeal. If the Court permits vague and sweeping appeal papers to raise all issues considered below, without specification of error in particular findings, and without particularization of what rules of law are claimed to have been violated, progress in the resolution of the problems of lengthy antitrust proceedings will be impeded. If an appellant in the

Court can in effect ignore the existence of detailed findings, a trial court has no incentive to make careful findings and trial counsel will see little point in urging such findings upon the trial court. The tendency of both trial counsel and the trial court will be to take the less arduous path of reaching decisions that deal in generalities and impressions, and that are in effect unreviewable except by an appeal which is a trial *de novo* for all practical purposes.

The Government as well as the Supreme Court has a responsibility to establish procedures in the appeal of cases of this sort which will perform the function of specifying the issues to be controverted, of lightening the burden on the parties and the Court and of enabling the Court properly to consider and to resolve the real points of controversy between the parties. In other cases, the Court has enforced its responsibility by taking action to ensure proper formulation of the issues. In *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596, n. 6, the Court stated that the excessive vagueness of the appellant's assignment of errors, caused by their number, properly subjected the appeal to dismissal, but that that defect had been sufficiently cured by clarifying statements made by the appellant in its opposition to the motion to dismiss. In *Schine Chain Theatres* v. *United States*, 329 U. S. 686 and 817, the Court by a letter from the Clerk directed appellant to correct the first Statement as to Jurisdiction which was filed by properly stating what questions were contended to be substantial. The Supplemental Statement as to Jurisdiction which was filed failed to cure this defect and the Court on its own motion dismissed the appeal for failure to comply with Rule 12. 329 U. S. 686. Upon a petition for rehearing and a new Statement as to Jurisdiction being filed in proper form the Court reconsidered its order of dismissal and noted probable jurisdiction. 329 U. S. 817. Petitions for rehearing based

upon the curing of similar defects in the statements as to jurisdiction were also granted after dismissal in *City Bus Co.* v. *Mississippi*, 299 U. S. 520 and 300 U. S. 639, and in *Twisp Mining and Smelting Co.* v. *Chelan Mining Co.*, 320 U. S. 705 and 716.

The action taken by the Court in these cases suggests a more direct method for curing defects of the sort which permeate the appeal papers here. Appellee has filed this motion in the alternative in order to enable the Court, if it fails to dismiss, to adopt and apply a procedure to cure these defects. An order requiring appellant to clarify and define its Assignment of Errors and Statement as to Jurisdiction will serve to force appellant to present concrete issues warranting exercise of the Court's appellate jurisdiction. It will thereby serve to avoid what is threatened in this case and what has been unsuccessfully urged on the Court before[2]—a trial *de novo* on a cold record of the whole of the scope of the issues of fact determined by the court below.

A. *The Nature of the Proceedings Below*

The trial of this long antitrust case, not including pretrial and procedural conferences, occupied 65 days of courtroom proceedings. Almost two years elapsed between opening statements and final argument. The transcripts of oral testimony and argument are over 10,000 pages long. There were approximately 2530 exhibits introduced by the parties. Counsel discussed the exhibits in detail as they were introduced. The trial court accompanied by counsel for both parties, personally made a tour of a cellophane manufacturing plant and attended a trade exhibition of the

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[2] *E. g., United States* v. *Yellow Cab Co.*, 338 U. S. 338; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596-597; *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 330-332; *Besser Mfg. Co.* v. *United States*, 343 U. S. 444, 446-447.

flexible packaging industry, showing the materials made, the machines used to make them and the various products offered by manufacturers, convertors and distributors. Thirty-nine witnesses testified as to the various transactions, practices, agreements and market facts which were the subject matter of the case. The trial court heard five days of oral argument covering every aspect of the case raised in this appeal and spent almost a year in its study of the record and the preparation of its findings and opinion dismissing the charges.

The case was principally a fact case. The issues which were tried were whether du Pont in fact had monopoly powers over the manufacture and sale of cellophane and cellulosic caps and bands and whether its position was the result of exclusionary practices. On the basis of the testimony of the witnesses and of the exhibits introduced by both parties, the court below made detailed numbered findings on every issue litigated before it. There are 834 of these subsidiary findings and 20 which are entitled "Conclusions of the Master Facts."[3] They include findings on the nature of the market, on the competitive pressures exerted on the price of cellophane by other flexible packaging materials, on the competition from Sylvania and Olin in the manufacture and sale of cellophane, on du Pont's research, sales and distribution programs and on the strength, importance and effect of du Pont's moistureproof patent. They also include detailed factual determinations of the operation and effect of each of the agreements with foreign concerns, the license agreement with Sylvania and the distribution practices alleged by the Government to be exclusionary. They en-

[3] About 90 of the 854 findings relate solely to cellulosic caps and bands. Despite the breadth of Assignment of Error No. 17, the Statement as to Jurisdiction indicates that the Government does not seek review of the trial court's dismissal of the charges that du Pont monopolized trade in these products.

compass, in short, in detail and without exception every issue raised in this appeal.

On the basis of these detailed findings, the district court concluded as a matter of fact that du Pont did not have monopoly power to raise the price of cellophane (Opinion pp. 327-333; Findings 710-712, 726), but rather that the "prices du Pont charged were prices which it was obliged to charge as a result of competitive conditions in the market" (Opinion p. 332). It also found that in fact du Pont had no arbitrary or unlawful monopoly power to exclude competition in the manufacture of cellophane (Opinion pp. 331-341; Findings 727-731) and in fact had not excluded (Opinion pp. 335-338; Findings 354-388). Finally, it determined that none of the alleged exclusionary practices and agreements had any effect or contributed to du Pont's position in the industry (Opinion pp. 356-370; Findings 340-645), but that on the contrary du Pont's success had been achieved solely by superior technical skill and competitive activity (Opinion pp. 345, 349-351; Findings 80-112, 123-149).

B. *The Nature of the Government's Appeal*

The numbered findings of the district court afford appellant ample opportunity to refer to any specific findings or conclusions that it regards as erroneous. Appellant has not done so. On the contrary, not a single finding is referred to by number in any of the assignments of error or challenged by number in the Statement as to Jurisdiction. The conclusions of law claimed to be erroneous are not identified with particularity but are rather characterized in language which obscures the actual conclusions reached by the district court and the nature of the supporting facts on which such conclusions are based. Appellant's papers are so drawn as to enable the Government as it chooses to adopt or attack any or most of the findings made by the court below, to dispute the trial court's judgment of the veracity and accuracy

of the numerous witnesses which appeared before it and to ask the Supreme Court to retry on a cold record the whole of the case on the monopolization of cellophane presented by the Government in the court below.

The Statement as to Jurisdiction does nothing to make the issues concrete.[4] It states five questions which the Government claims to be presented by the decision below and to be substantial and thereby gives an appearance of isolating major issues of law to be decided by this Court. This appearance is illusory. Each question asserted by the Government to be substantial either is not presented or attacks a conclusion of fact based upon detailed findings of fact. The questions asserted by the appellant to be substantial in truth raise before the Supreme Court in the same form as they were litigated before the district court the factual issues of the degree of market power possessed by du Pont and the effect of the agreements, practices, transactions and incidents claimed to be unlawful. The appeal constitutes simply another sweeping attack on the whole conduct of du Pont's cellophane business made with no regard for the judgment and findings below. The Government's attempt to make these questions sound as if they did raise substantial questions of law is based in part on misinterpretations of the opinion and findings of the trial court and in part on erroneous statements of fact.

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[4] The Assignment of Errors does not limit the issues raised by the Statement as to Jurisdiction. On the contrary, it states and attacks every conclusion relating to cellophane which the Government conceives to have been reached by the district court. It does not inform the Court or the appellee which if any of the findings of fact made below are claimed to be clearly erroneous, but rather is formulated in blanket language so as to permit attack on any or all of the findings. For example, assignments 6 through 11 simply state in different ways that the Government contends the district court erred in finding that du Pont lacked monopoly powers. Other assignments similarly broadly assert in different ways that the district court was wrong on the major issues, and in some cases extend the issues beyond those raised in the Statement as to Jurisdiction (assignments 1, 5 and 17).

1. The first question asserted by the appellant rests upon its statements that the district court held "that the test be applied in passing upon the monopoly charge was whether du Pont had monopoly power over trade in the entire field of all flexible packaging materials, and not merely in the cellophane industry," and that cellophane "is not a sufficiently distinctive product, or does not have a sufficiently separate market of its own, to be capable of being monopolized." This is not what the trial court held. At the outset of its discussion of whether du Pont had monopoly powers the trial court posed two "master factual questions" as follows (Opinion p. 307):

> "1. Does du Pont have power, without regard to competitive forces, to raise price of *cellophane* either directly or by limiting production, deteriorating quality, or by any other means?
>
> "2. Does du Pont have power alone to exclude competition in the production and sale of *cellophane*?" (Emphasis supplied.)

These were the major issues presented at the trial. They were the issues upon which the market evidence was presented and received by the district court and they were the issues which that court decided. Findings both as to power over price (e.g., Findings 162, 710-712, 715, 840) and power to exclude competitors (e. g., Findings 354-356, 358-376, 386, 727-730) were expressly stated in terms of the price of cellophane and the manufacture of cellophane as such. It is impossible to determine from appellant's papers whether any or all of these findings or the detailed subsidiary findings supporting them are challenged. The evidence as to these matters consisted for the most part of evidence of "buyers' habits" and "mobility of demand" which are precisely the factors named in *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 612, cited by the Government, as "evidence which could circumscribe a broader or nar-

rower 'market'." On the basis of this evidence plus evidence relating to the other producers of cellophane and other market facts (Opinion p. 341), the trial court concluded that the "prices du Pont charged were prices which it was obliged to charge as a result of the competitive conditions in the market" (Opinion p. 332). Whether the trial court was correct in reaching its conclusions is not a substantial question of law but is solely a question whether the evidence presented to the trial court taken as a whole supports its conclusions or whether they are clearly erroneous within the meaning of Rule 52(a). This question does not specify an issue, but rather asks a trial *de novo* on the basic factual question in the case.

2. The second question asserted by the appellant, whether du Pont possessed unlawful powers to exclude competition, also raises no question of law which is substantial. The court below determined upon evidence of the history of the cellophane industry in the United States, of du Pont's business practices and those of its competitors and of the market facts concerning the production and sale of cellophane, including such facts as the availability of sources of supply and the continuing freedom of choice on the part of consumers of cellophane, that du Pont lacked any artificial or monopoly power to exclude competitors from the production and sale of cellophane and in fact had not excluded. In making this determination, the district court expressly followed the interpretation of the meaning of Section 2 of the Sherman Act laid down in *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811.

The appellant in its Statement as to Jurisdiction attempts to suggest that the trial court, while purporting to follow the *Tobacco* test, took into consideration irrelevant factors and excluded from consideration controlling factors. The trial court did not do this, and the question which the

Government states to be presented and states to be substantial is a question which is not in truth raised by this appeal.

The trial court did not apply as "affirmative tests" the factors which the Government states "we view as erroneous." It explicitly stated that there was no question raised whether du Pont had power to exclude competition from the manufacture of flexible packaging materials (Opinion p. 307), and it simply treated as part of the proof of the Government's failure to prove its allegations of actual exclusion of named companies and the fact that Sylvania was in the business and was actively competing. It took these factors into consideration along with a mass of other data specified in its opinion and findings (Opinion pp. 333-341; Findings 354-455, 696-705, 727-732), including the facts relevant to each of the considerations which the Government's Statement as to Jurisdiction says the court "totally disregarded"—the lack of entry by others (Findings 331-338, 354-355, 562), the importance of La Cellophane's secret process (Opinion pp. 334, 352-359; Findings 592-593, 602-645), the technical agreements with other foreign producers (Finding 614), and the effect of du Pont's patent position (Opinion p. 339; Findings 456-457, 470-480).

In considering these factors, the trial court heard the testimony of numerous independent witnesses from the industry, including du Pont's customers and its competitors and executives of the companies alleged to be excluded potential competitors. It also considered all of the statistical and other market data which were presented to it by both parties. It did not exclude any evidence offered by the Government on this issue and it heard argument on all of the factors listed in the Statement as to Jurisdiction. Its determination on the extent of du Pont's power was necessarily a determination of fact. The only questions raised by this determination are whether the numerous specific findings of fact are not supported by evidence but are clearly erron-

eous under Rule 52(a), and whether the conclusions of fact which the trial court drew from its findings on particular factual disputes are clearly erroneous. The question asserted by the appellant does not specify any substantial issue of law, but rather raises the question of du Pont's power to exclude without stating which findings are accepted and which are attacked and without informing either the Court or the appellee what issues are to be contested.

3. The third question stated by the Government to be substantial is on its face no more than a question of fact. That question is whether the Government proved that du Pont had monopoly power to raise the price of cellophane within the meaning of the test stated in *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811. As in the case of the question of the power to exclude competition, the court below expressly applied the *Tobacco* test and found upon the record as a whole, including the testimony, often unchallenged, of numerous independent witnesses, that du Pont lacked this monopoly power (Opinion pp. 327-333; Findings 123-149, 162, 692, 700, 702, 710-712, 721).

In reaching its conclusion, the court below considered all of the mass of evidence before it, and all of the fact arguments made by the Government and repeated here in the same form as they were addressed to the district court. It considered and specifically made findings in favor of appellee on the argument that du Pont had power to raise prices as far as Sylvania is concerned (Findings 324-327) and on the argument that there was an alleged "wide margin" within which du Pont had power over prices (Opinion pp. 328-329; Findings 162, 164, 699-703, 712, 726). The Government's Statement as to Jurisdiction fails to make clear even whether it considers these specific findings refuting its fact arguments to be clearly erroneous, and wholly fails to inform either the Court or the appellee whether it is attacking

any or all of the numerous other findings, some of them controlling, made by the court below on this issue.

4. The fourth question stated by the Government to be substantial misconstrues the trial court's holding that if a position "is acquired, as it has been in this case, by superior technical skill and effective competitive activity" the resulting power from that position does not constitute monopolization within the meaning of Section 2 (Opinion 345). This holding is supported by specific and detailed findings that the alleged exclusionary practices and agreements charged by the Government had no effect and were not a contributing cause to du Pont's success (Opinion pp. 348-351, 356-379; Findings 340-645, 687-632), and is in clear contradistinction to the finding of the trial court in the *United Shoe* case, cited by appellant, that the exclusionary leases were a principal cause of United's position. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 285, appeal pending No. 394, October Term 1953. The holding is clearly consistent with the statements of Judge Hand in *United States* v. *Aluminum Co.*, 148 F. 2d 416, 430, and the statements of the Supreme Court in *American Tobacco Co.* v. *United States*, 328 U. S. 781, 786.

In making this holding, the court below was forced, by the sweeping nature of the Government's attack, to consider and make findings on almost everything done by du Pont during the 30 years it has been in the cellophane business. Its findings and opinion cover the operation and effect of the foreign agreements, of the Sylvania license and of du Pont's distribution practices, and also the effect and importance of du Pont's research, its technical skill and its sales techniques (Opinion pp. 341-378; Findings 391-392, 403-406, 416-418, 558, 560, 564-580, 626-645). There is nothing in the Government's Statement as to Jurisdiction which in any way limits the review it asks the Court to make of the purposes, operation and effect of each of the agree-

ments, practices and isolated transactions which it challenges by presenting this general question for review. The question as presently framed rather brings up numerous and complicated issues of fact which were fully litigated before the court below and on which the court below made specific and detailed findings, and does so without informing either the Court or the appellee which if any of these findings are to be challenged or which are accepted or what issues are to be contested.

5. The fifth question asserted by the Government to be substantial rests upon the district court's statement that the moistureproof patent represented a defense, and is phrased in language which suggests that the patent was invalid, and that the district court treated it as a defense in the face of proof of patent abuse, as to unpatented products and for periods when the patent was not in effect. The actual holding of the court below on the effect of the patent establishes that the question stated by the Government to be presented and to be substantial is not presented at all, and that the question actually presented is not substantial. As its opinion makes clear (Opinion pp. 342-344), the district court's holding was limited to the proposition that the existence of powers based solely upon the lawful monopoly granted by a valid product patent, covering the product claimed to be monopolized, is not in violation of Section 2 of the Sherman Act. This is settled law. See *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 57; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 422 (2d Cir. 1945). There is no suggestion anywhere in the opinion of the district court that it considered the moistureproof patent to be a defense to charges relating to unpatented cellophane or to a period when the patent was not in effect.

What the Government has done by raising its supposed question is to make it unclear whether it is trying to avoid

its own concessions of validity [5] (Findings 332, 456), or to attack the numerous findings of the district court on the origin and effect of the patent and the importance of moistureproof cellophane (Opinion pp. 339, 356; Findings 10, 331-338, 480-482, 643, 645, 850) on du Pont's development and exploitation of its invention (Findings 99-106, 127-129, 145, 335, 340-349, 694) and on the absence of abuse of the patent (Opinion pp. 366-467, 378; Findings 564-569, 574-577, 583). The Court and the appellee are entitled to be informed which if any of these findings are claimed to be clearly erroneous, which are accepted and what issues in this regard the appellant intends to raise.

C. *The Burden Placed upon Appellee and the Court by the Excessive Vagueness of the Papers as Filed*

The above discussion of questions raised in the Statement as to Jurisdiction demonstrates that the appeal papers which have been filed here do not in any respect limit the issues which are raised by the appeal or amount to anything more than a broad claim that the district court erred when it dismissed charges of the unlawful monopolization of cellophane. Appellee is not informed of any specific findings which are claimed by the Government to be clearly erroneous. It is not informed what findings it can take to be accepted by the Government and it is not informed whether there are any conclusions or holdings made by the court below relating to transactions in cellophane which will not be contested.

The confused posture of this case in its present state is revealed by the papers filed by appellant in still another way. The appeal papers, as has been indicated, appear to attack

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[5] Compare the unqualified concessions by Government counsel at the trial that all claims of the patent were valid so far as this case is concerned with the Government's characterization of the patent in its Statement as to Jurisdiction as one whose "scope and validity have never been adjudicated."

numerous findings relating to cellophane. Yet the praecipe filed by appellant in the district court designating the portion of the record it wishes to have certified and brought before the Supreme Court does not designate as part of the record over 1000 defense exhibits on many of which the trial court expressly relied to support the findings, and which must obviously be before the Supreme Court if the findings are to be challenged.[6] E. g., *Petition of Gogate*, 126 F. 2d 1020 (3d Cir. 1942).

As matters now stand, appellee must file its praecipe designating all portions of the record relating to cellophane which appellant has not designated in its praecipe. Unless the issues are sharpened, this all inclusive approach to the record will unavoidably be carried into the designation for printing because appellee will not know what matters it may safely omit. On the other hand, if the issues are clarified, it will be appropriate to eliminate from the printed record much of the material brought to the Court by praecipe. If in truth appellant is not contesting findings in bulk, but only certain specific findings and conclusions of law, then there is no reason to print and ask the Court to read the voluminous record covering all the evidence on every finding, numerous evidentiary and procedural rulings, and dealing in detail with the daily grist of the courtroom activity, all of which is brought to the Court by the praecipes. The way to try a case even on an appeal such as this is to have the issues clear and bring to the Court the evidence which is pertinent to those issues and to those issues alone.

The defects in appellant's papers also impose an immediate and excessive burden on appellee in the preparation

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[6] Indeed the praecipe is so unrelated to appellant's other papers that even a defense exhibit expressly relied on in the Statement as to Jurisdiction (DX 735) was not included in the portion of the record brought to the Court by appellant.

of its case. It cannot prepare responsive papers in draft form because it will not know until appellant's brief is filed, if indeed then, what fact or legal issues are to be argued. In addition, appellee will be subject at any time during the case to renewed attacks on findings which it considered to be accepted by the appellant. Appellant will be free in its main brief to state the entire case on the basis of selected evidentiary material as if no findings existed and in the same manner as it unsuccessfully argued the case to the court below. Both in its reply brief and upon oral argument the appellant on the basis of its present papers may open up new issues to bring to the attention of the Court evidence relating to particular findings which were considered by the trial court in making its findings, but which appellee may not have opportunity to controvert before the Court within the limited time permitted for argument.

The burden which this places upon the Court is even more immediate and direct. The Court has held repeatedly that it will not try *de novo* the complicated and numerous fact issues raised by big antitrust cases. *United States* v. *Yellow Cab Co.*, 338 U. S. 338; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596-597; *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 330-332; *Besser Manufacturing Co.* v. *United States*, 343 U. S. 444, 446-447. The form of the appellant's Assignment of Errors and the attempt in its Statement as to Jurisdiction to make it appear that substantial questions which are not in fact involved in the case are presented for review indicates that the Government has drafted its appeal papers so as to avoid the teaching of these cases. It is nevertheless clear that in their present form these appeal papers bring before the Court every issue of fact and law relating to the alleged monopolization of cellophane which was controverted before the district court, and that the Government is asking for a trial *de novo* on the merits of its case.

If this appeal were from a decision that did not carefully follow and apply the requirements of Rule 52(a) as to findings of fact, as in the *Oregon Medical* and *Timken* cases, *supra*, it may be that if there were to be any review at all it would have to be a review of all of the proceedings below. Rule 52(a) was, however, designed to prevent such blanket review. Here the district court carefully and explicitly followed the requirements of that Rule. Its findings are numbered, are specific, and are detailed. They go to every issue which was litigated at the trial. They are annotated by references to the record so as to make clear what evidence it is that supports them. If an appellant is permitted to bring a sweeping appeal attacking all aspects of the opinion and the findings of the court below from this sort of an opinion, it will destroy the meaning of Rule 52(a) and will provide a precedent for the Court to hear the complaints of every losing party in any major antitrust case with regard to every issue of fact on which the trial court has decided against him.

The *Schine* and *Timken* cases, discussed earlier herein, indicate that this can be avoided short of dismissal. Appellee believes that in exercising its appellate jurisdiction, if it fails to dismiss, the Court can properly, and should, establish a procedure for clarifying the issues involved in an appeal of this type by granting a motion such as the motion here made to clarify the issues actually raised by the appellant whenever the appeal papers are so drawn as to fail to perform that function. Unless this is done this Court will, not only in this case but in its future review of major antitrust cases, be inevitably faced with an intolerable burden of reviewing lengthy and complicated records and making a determination for itself on numerous, complex and hotly contested issues of business fact.

Conclusion and Prayer for Relief

For the reasons stated above, appellee respectfully moves the Court to enter an order dismissing the appeal, or in the alternative, to enter an order requiring appellant to clarify and define its Assignment of Errors and Statement as to Jurisdiction by:

(1) Specifying by number each of the findings of fact made by the district court which are claimed to be clearly erroneous;

(2) Specifying with particularity the questions actually presented by the opinion and holdings of the district court which appellant contends to be substantial.

Respectfully submitted,

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